ments. Although the notes of evidence contain several references to these exhibits, there is nothing in the records which showed that the documents were tendered and marked as exhibits. We have seen B29 or (B1-10) which are in the possession of the trial court. These are not original copies but merely photostat copies. Thus in the absence of the original documents, and the lack of explanation as to their disappearance the photostat copies could not be admitted. Hence B29 are not admissible and with their inadmissibility the appellant's counterclaim remain unproved. We therefore agree with the conclusion of the learned judge in rejecting this counterclaim.

Observation

The records of appeal in this case consist of five fat volumes, each weighing almost two kilos. These records could have been reduced to a relatively small volume. The delivery orders which occupy more than half of the first volumes and the forest removal passes which were reproduced in the other four volumes could have been dispensed with, as we could always be invited to see the original exhibits tendered in court. All that is necessary is to provide a list of those documents in a tabulated form giving all the necessary particulars. If this had been done a great deal of time and money would have been saved and we would certainly have been spared of carrying these heavy but otherwise quite empty records. Perhaps it behoves those responsible for the preparation of records to use a little discretion to decide what should be included and excluded from the records. This is not the first time this court has to make this sort of remarks. Similar comments were expressed by Chang Min Tat F.J. when delivering the court's judgment in *Ooi Soon Eng* v. *Ng Kee Lin.*[3] In this connection we would like to draw the attention of those responsible for preparing records of appeal to take note of the observations of their Lordships of the Privy Council in *Chow Yee Wah & Anor.* v. *Choo Ah Pat*[4] so that unnecessary time and money would be saved.

Judgment

In view of the could-not-careless manner in which these records were prepared, we feel that the cost of reproducing the delivery orders P4 and Forest removal passes D5 should be borne by the appellant so that its entitlement to cost before us is reduced by the cost of their preparation and inclusion in the appeal records. Finally we allow the appellant's appeal against the order that it pays the respondent a sum of $110,000 plus interest at 6% per annum; and dismiss its appeal against the order rejecting its counterclaim of $18,862.25. We confirm that its counterclaim of $5,807 plus interest as ordered by the court below stands. The appellant is entitled to the cost in the court below and before us but reduced by the sum representing the cost of preparing and including P4 and D5 in the records of appeal.

Order accordingly.

Solicitors: *Zain & Co.: Malek & Joseph Au.*

TIO CHEE HING & ORS. v. GOVERNMENT OF SABAH

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) September 8 & October 21, 1980]

[Kota Kinabalu — Federal Court Civil Appeal No. 252 of 1979]

Practice and Procedure — Claim against Government — Limitation — Application to strike out statement of claim on ground that claim statute-barred — No defence entered — R.S.C. 1957, O. 25 r. 4 — Government Proceedings Ordinance, 1956 — Public Authorities Protection Act, 1965, s. 4.

Government Proceedings — Limitation — Statement of claim.

Land Law — Lease by Government — Arrears of rent — Sale of land to recover arrears.

In 1962 the Government of the Colony of North Borneo had leased 851 acres to certain persons subject to a development plan. The lease was transferred to the Southern Estates Ltd., the 2nd appellants. The rent fell into arrears and the Government sought to sell the land to recover the arrears. The original lessees and the transferee thereupon filed a claim for damages against the Government of Sabah alleging breach of an agreement by the Government of the Colony of North Borneo to lease a further 2430 acres to them. They also sought a stay of the sale of the 851 acres until the determination of their claim for damages. The Government of Sabah did not enter appearance or file a defence but applied to strike out the statement of claim on the ground *inter alia* that the claim was statute-barred. The learned trial judge held that the claim was statute-barred and he dismissed the claim for damages. The appellants appealed.

Held, dismissing the appeal: (1) the appellants had not shown that the Government had promised to grant the whole of the 3280 acres applied for by the lessees;

(2) in any event, the appellants' claim was clearly statute-barred and not maintainable against a defence that relied on limitation;

(3) no reasons were adduced for the stay of execution of the sale of the land and the application was rightly refused.

Cases referred to:-

(1) *Murray* v. *Secretary of State for India* English & Empire Digest vol. 11 paragraph 375; [1931] W.N. 91.

(2) *Dismore* v. *Milton* [1938] 3 All E.R. 762.

(3) *Riches* v. *Director of Public Prosecutions* [1973] 2 All E.R. 935.

FEDERAL COURT.

G.T.S. Sidhu for the appellants.

Stephen Foo Kiat Shin (Deputy State Attorney-General) for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): In this action, the appellants sued the Government of Sabah for the loss of income from a piece of land of area 3280 acres which they quantified at $44 millions odd or alternatively for $13.2 million for the value of the land as a coconut plantation and the value of the timber thereon. With respect to the draftsman of the statement of claim, it must be said that the arithmetics of either of these two alternative heads of claim are not easy to follow from the figures given.

The language used in the statement of claim is also, with respect, so verbose and mixed that it becomes necessary to sort out the wheat from the chaff. This much, however, is clear from the statement of claim.

The donors of a power of attorney, then trading as partners in a firm known as the Chung Kwong Estates were the applicants in Lahad Datu Land Application No. 238/60 (L/A. 238/60) for a tract of virgin jungle land of some 3280 acres in extent. The development of this tract of land meant, first, the extraction of the timber thereon and then, turning it into agricultural land, more particularly into a coconut and rubber plantation. The application was made at that time to the then Government, which was the Government of the Colony of North Borneo.

The statement of claim next averred that "some 820 acres of L/A. 238/60 had been approved in the first instance" subject to the conditions imposed. If this averment implies that the application for the entire 3280 acres had been approved and that a grant of 820 acres was to be issued as the first part of the approved application, the language used falls far short. On September 5, 1962, the Government of the Colony of North Borneo granted a lease No. 17397 not for 820 acres but for 851 acres to the applicants for a term of 99 years from April 3, 1962 at an initial annual rent of $851, the rent to be increased to $3,404 from January 1, 1968 and to $4,106 from January 1, 1972. The lease is subject to a development plan, which is for the development of 10%-25% of the area in the first year, then the next 40% for the following 3 years and the balance in the next period of 3 years. Within 7 years the area of 851 acres was to be fully developed as a coconut and rubber plantation in accordance with a plan to be submitted by the lessees to the Director of Lands and Surveys. Nothing in the lease indicates that it was part of the whole area applied for, or if in fact it was, that the remaining area had been approved for alienation.

There the matter stood. On September 16, 1963 (Malaysia Day) the Government of the Colony of North Borneo was succeeded by the Government of Sabah as a component unit of the Federation of Malaysia. At no time before its demise had the outgoing Government ever issued any grant for the remaining area of L/A. 238/60 and it is also to be observed that no averment was made that this remaining area had been approved for lease to the applicants.

The next significant development is the "transfer" of the lease by the lessees to the Southern Estates Ltd., presumably with the approval of the Government. With this assignment of the lease, the original lessees would have dropped out of the picture, save as to their liability for any breaches of the terms and obligations of the lease on their part to be performed but they have been kept in the picture by the device of a power of attorney executed by them in favour of the donee, Tio Chee Hing who is at all relevant times, the Managing Director of Southern Estates Ltd. on the contention that they have a claim against the Government and their attorney is only prosecuting this claim.

Apparently this claim is founded on an expectation of the balance of the 2430 acres in L/A. 238/60. In order to establish it, an effort has been made to extend the development term in Lease No. 17397 to the entire area. In our view, it is entirely without foundation. The actual lease issued is in respect of an area of 851 acres and the development term relates therefore to this area and does not and cannot relate to land that has yet to be alienated or approved for alienation to the applicants. There is no justification for referring to any second or third stages in respect of the other area of 2430 acres.

The statement of claim referred to some correspondence between the Government of Sabah and Southern Estates Ltd. in respect of a Land Application No. 0910003 for 1,500 acres. The appellant, Tio Chee Hing, admitted to some confusion in his mind with regard to this application. He said he did not make it. He maintained there was only one application L/A. 238/60 for 3,280 acres. Whatever the true position is or whether, if in fact Tio Chee Hing or Southern Estates Ltd. did not make it, a new number had been allotted to the old application, Southern Estates Ltd. was advised on March 26, 1971 that this application was disapproved by the Chief Minister.

The factual position therefore is this: Neither the Government of the Colony of North Borneo nor its successor the Government of Sabah had issued a lease for the remaining 2,430 acres in L/A. 238/60 or approved any application therefor. Of the area of 3,280 acres applied for, the applicants had a lease of 851 acres only. Yet it is in respect of the application and not of any agreement to grant a lease that the appellants claim damages for the breach of contract by the Government of Sabah for the contract made by the Government of the Colony of North Borneo. The damages are:

Either

(A) 3,280 acres yearly copra production = 3,280 tons or 55,014 pikuls at average market price of M$40.00 per pikul, less cost, transport and duty etc., regular income i.e. M$20.00 × 55,014 pikuls × 40 years = M$44,061,200.00

or (1)(B) The minimum value of the total 3,280 acres of coconut plantation at M$2,500.00 per acre amounting to ... ... M$ 8,200,000.00

(2)(B) Income from timber extracted on the remaining area of 2,500 acres, i.e. 2,500 acres by 1,000 cu. ft. per acre or 2,500,000 cu. ft. = M$2.00 per cu. ft. amounting to ... ... M$ 5,000,000.00

M$13,200,000.00

Interest is also asked for at 6% p.a.

The statement of claim also referred to the Lease No. 17397 for 851 acres. The lessees had over the years fallen into arrears of the rent. For the years 1969-1973 inclusive, the arrears totalled $20,424. No rent for the years 1974-1978 inclusive had been paid. At $5,106 a year, the arrears came to $25,530. The total was $45,954. The Government now desired to auction and sell the land to recover the arrears of rent under the provisions of the Sabah Land Code. The appellants sought a stay of the sale and auction, until the determination of the claim for damages, mainly on their contention contained in the letter of

November 29, 1972 that they had been compelled to abandon this so-called first stage as the result of the Government's breach of its "promise" to grant a lease of the other area of 2,430 acres. In the matter of an application for a lease, it would be an approval of the application and not a promise.

No action was previously taken by the appellants to enforce this alleged promise but when the Government on January 16, 1979 served Southern Estates Ltd. with a notice of demand for the arrears of rent and threatened to put the land up for sale for the recovery of the rents in arrears, then and only then did Tio Chee Hing set about constituting himself the attorney of the original applicants in L/A. 238/60 and as such attorney and with Southern Estates Ltd. institute this action.

The response on the part of the Government of Sabah was, without entering an appearance (so far as the record shows) and without delivering a defence, to apply under Order 25 rule 4 Rules of the High Court 1957 and under the inherent jurisdiction of the High Court, for an order to strike out the statement of claim on the grounds that (a) it disclosed no cause of action, (b) it was frivolous and vexatious and an abuse of the process of the court and (c) the claim was statute-barred.

At the hearing of the summons, Government chose to rely entirely on limitation. The appellants did not take any objection to the standing of counsel for Government which had failed to enter an appearance, nor did they do so before this court on their appeal.

The arguments for and against the summons have not been incorporated in the record but the learned judge agreed with Government. He delivered an admirable judgment which we do not pretend we can better and which we therefore reproduce:

"The breach alleged by the plaintiffs, if there was such a contract, had occurred more than six years ago. The plaintiffs in their affidavit in opposition made by Tio Chee Hing say to the effect that the Limitation Ordinance does not apply to their case because they were only aware that they could sue the present State Government in 1977 and because the agent of the defendants had as late as November 25, 1978, demanded payment of quit rents. These, in my opinion, are not facts which would make the Limitation Ordinance inapplicable to the plaintiff's action.

It was a settled rule of practice in England that a party relying upon the statute of limitations must plead it as a defence specifically. The defence was not available, and it was no part of the duty of the court to take notice of the statute of limitations, unless it was specifically pleaded. On the authorities such as *Murray* v. *Secretary of State for India;*[1] and *Dismore* v. *Milton*[2] it was not possible for the defendant to apply under Order 25 rule 4 of the Rules of the Supreme Court to have the claim struck out where it appeared from the Statement of Claim that the plaintiffs' cause of action arose at a time before the period prescribed by the statute of limitations.

The practice was that the defendant had to deliver a defence pleading the statute of limitations as a defence specifically. It was then for the plaintiffs to show that the statute was inapplicable. This would be followed by a summons for directions for an issue to be tried.

We have, I think, followed this practice in this country.

Recently, the Court of Appeal in *Riches* v. *Director of Public Prosecutions*[3] considered that the observation in *Dismore* v. *Milton* went too far. It held, not following *Dismore's* case, that where it was clear that the defendant was going to rely on the statute of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it, the claim would be struck out. His Lordship, Davies L.J. in his judgment at page 939 said:—

'In the light of those more recent authorities I think, as I say, that perhaps the observations of this court in *Dismore* v. *Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the Statement of Claim discloses no cause of action, the limitation objection should or could prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail.'"

With respect we entirely agree.

But perhaps we should add that the appellants' reliance on their difficulty in obtaining a copy of the Constitution of Sabah in 1977 or earlier because there was no such copy printed, if they did endeavour to get a copy, was not a fact established merely because there was a reprint in 1977. In any event, the contention that they did not know that Government could be sued, even if it had any relevance to Government's reliance on the defence of limitation, completely ignores the Government Proceedings Ordinance 1956 which was extended, *inter alia*, to Sabah by the Modification of Laws (Government Proceedings and Public Authorities Protection) (Extension and Modification) Act 1965 (L.N. 67 of 1965) made under section 74 of the Malaysia Act (F.M. 26 of 1963) and in particular section 4 thereof which provides:

"4. Subject to the provisions of this Ordinance and of any written law, any claim against the Government which —

(a) is founded on the use or occupation or the right to the use or occupation of State land; or

....

(c) arises out of any contract made by the authority of the Government which would, if such claim had arisen between subject and subject, afford ground for civil proceedings; or

....

shall be enforceable by proceedings against the Government for that purpose in accordance with the provisions of this Ordinance."

There is not the slightest suggestion that this Ordinance was not available to the appellant or his then legal advisers.

The claim of the appellant would appear to be founded on a promise which the then Government of the Colony of North Borneo had made to grant the whole of the 3,280 acres applied for in L/A. 238/60. It is however to be observed first, that the statement of claim did not expressly make any averment that L/A. 238/60 had been approved *in toto*. It is not unknown for approval to be given to only a part of the area applied for and it may very well be that the approval of the 851 acres actually granted was not a first grant to be followed by others. Secondly, the statement of claim did make an attempt to infer from the conditions of the Lease No. 17397 relating to the development of the area of 851 acres, an implied approval to grant a lease of the whole area of 3,280 acres. But to our mind, it is clear and beyond argument that the planned development of the area within 7 years related only to the 851 acres in the lease and not to the whole area. Whether

this attempt at an extended and unjustified construction of the conditions of the lease was for the purpose of supplying the missing link of an approved application for the whole area may now be a matter of speculation, but if it was not, why did not the appellants refer to an approved application for the entire area?

In any event, if the appellants' claim was founded on an application approved in 1961 or 1962 or the refusal in 1971, it was clearly in 1979, at the institution of the action, statute-barred and not maintainable against a defence that relied on limitation.

As for the prayer for a stay of execution of the sale of the land in Lease No. 17397, no reason, except for an emotional one, was advanced.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Shelley Yap, Chong, Chia & Co.*

YONG JOO CHUAN & ANOR. v. TAN TECK CHIANG

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) September 11 & November 14, 1980]

[Kuching — Federal Court Civil Appeal No. 114 of 1980]

Landlord and Tenant — Tenancy to commence from date of registration of sublease — Notice to quit — Whether valid notice — Sarawak Rent Control Ordinance, ss. 15(1) & 19.

In this case the respondent had agreed to lease the premises to the appellant for a period of 15 years, the tenancy to commence from the date of the registration of the sublease. A memorandum of sublease was subsequently executed on September 3, 1957 and this was registered on September 25, 1957. The premises were protected by the Control of Rent Ordinance. The respondent gave a notice to quit to appellant stating that the memorandum of lease would expire on September 2, 1972. The appellant did not vacate the premises and subsequently the respondent gave notice to expire on October 31, 1972. The appellant claimed possession of the premises. The learned trial judge held that the first notice was valid and gave judgment for the respondent. The appellant appealed.

Held, allowing the appeal: (1) the notice to quit was bad as it did not coincide with the term of the contractual tenancy, which commenced on September 25, 1957 and therefore ended on September 25, 1980;

(2) the respondent had failed to bring their case within any of the grounds set out in section 15(1) of the Rent Control Ordinance and were not entitled to recover possession of the premises.

Cases referred to:-

(1) *Hong Geok Cheng* v. *Elizabeth Jacques* [1981] 1 M.L.J. 12.

(2) *Jong Chim Hap* v. *Pei Hen Fui* [1954] S.C.R. 18, 25.

(3) *Yong Joo Chuan* v. *Tan Teck Chiang* [1978] 1 M.L.J. 173.

(4) *Tan Swee Hoe Co. Ltd.* v. *Ali Hussain Bros.* [1980] 2 M.L.J. 16.

FEDERAL COURT.

Patrick Tan for the appellant.

Chew Pok Oi for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This appeal is against the ruling of the learned judge upholding the validity of a notice to quit.

Respondent is the registered proprietor and landlord of premises described as No. 43, Gambier Road, Kuching. Appellants are the tenants. On July 15, 1957 the parties executed an agreement whereby the respondent agreed to sublet the whole ground floor to the appellants. A lump sum of $18,500 was paid. It was said this was for purchase of the legal interest on the lease which was to be effective from date of registration. The tenancy was for 15 years. The rental was $120 per month. Clause 4 is significant for it states: —

"The landlords shall give vacant possession at the end of the month. An agreement shall be drawn up at the lawyer's office and shall be registered with the Government. The commencing date of tenancy shall be from the date of registration."

Subsequently, on September 3, 1957 the parties entered into a Memorandum of Sublease for a period of 15 years at a rental of $120 per month "commencing from the date hereof." The Memorandum of Sublease was registered at the Land Office, Kuching on September 25, 1957. The premises is protected by the Rent Control Ordinance, 1948 (Cap. 86).

On June 22, 1971 respondent gave appellants a written notice in the following terms: —

"We refer to Memorandum of Sublease No. L.1740/1957 in respect of premises known as No. 43, Gambier Road, Kuching. The said Memorandum of Sublease will expire on the 2nd day of September, 1972. *Please note* that we shall require the said premises for our own use on the expiration thereof and ample notice is hereby given you to look for alternative accommodation in the meantime. We look forward to your kind co-operation in the matter."

Despite the notice, on the purported expiry of the sublease appellants did not vacate the premises. So, on September 5, 1972 another notice was sent to appellants as follows: —

"As instructed by Mr. Tan Teck Chiang the registered proprietor and landlord of the demised premises, in which you are occupying thereof as tenants of our client at the monthly rent of $120 (Dollars One hundred and twenty only) per month, we hereby give you one (1) month's notice to quit and deliver vacant possession of the demised premises, the said notice to take effect from the 1st day of October, 1972, and expire on the 31st day of October, 1972, or to expire at the end of the complete month or your tenancy which will expire next after service of this notice on you."

Appellants mentioned that the tenancy commenced from September 3, 1957 but respondent contended that it should be from date of registration. The learned judge upheld the appellants' contention. We think the learned judge wrong. The Memorandum of Sublease was executed as a result of the Chinese Agreement under which a lump sum of $18,500 was paid to secure a legal interest in the ground floor for a period of 15 years for business purpose. The agreement cannot just be discarded. It indicated the intention of the parties. It is the submission of appellants that the notice to quit dated June 22, 1971 is bad and invalid. Appellants relied on 1st notice. The 2nd notice merely terminates the statutory tenancy. The Sarawak Rent Control Ordinance is peculiar in that the termination of a contractual tenancy does not relieve the landlord from terminating the statutory tenancy according to law. The case of *Hong Geok*